

THE HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

0912139 B.C. LTD., a Canadian corporation,
and PAKAGE APPAREL INC., a Canadian
corporation,

Plaintiffs,

v.

RAMPION USA INC., a Washington
corporation, and RAMPION ENTERPRISES
LTD., a Canadian corporation,

Defendants.

No. 2:18-cv-01464-JLR

PLAINTIFFS' OPENING CLAIM
CONSTRUCTION BRIEF

Responsive Brief Due Date: June 7, 2019

Claim Construction Hearing: July 12, 2019

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. LEGAL STANDARDS FOR CLAIM CONSTRUCTION	1
III. ARGUMENT	2
A. Overview of the Asserted Patents	2
B. “Front Portion” (Joint Claim Chart (ECF No. 47-1) (“JCC”) at 1-23)	4
C. “Stretch Panel” (JCC at 71-82)	8
D. “Gathered from Side-to-Side and Top-to-Bottom by the Stretch Panel” (JCC at 50-63)	10
E. “Top Location” / “Bottom Location” (JCC at 24-32)	12
F. “Substantially Continuously Along Either Side of the Front Portion” (JCC at 32-50)	15
G. “Crotch Panel” (JCC at 82-85)	17
H. “Asymmetrical Stretch Characteristics” (JCC at 63-65)	18
I. “Rectangular” (JCC at 65-68)	20
J. “A Dart Seam Stitched Along a Bottom Portion of the Pouch” (JCC at 68-70)	22
IV. CONCLUSION	24

TABLE OF AUTHORITIES

PAGE

Cases

<i>Adapt Pharma Operations Ltd. v. Teva Pharm. USA, Inc.</i> , No. 16-7721, 2019 WL 1789463, at *4 (D.N.J. Apr. 24, 2019).....	20
<i>Amgen Inc. v. Hoechst Marion Roussel, Inc.</i> , 314 F.3d 1313 (Fed Cir. 2003).....	24
<i>Anchor Wall Sys., Inc. v. Rockwood Retaining Walls, Inc.</i> , 340 F.3d 1298 (Fed. Cir. 2003).....	6
<i>AstraZeneca AB v. Andrx Labs, LLC</i> , No. 14-8030, 2017 WL 111928 (D.N.J. Jan. 11, 2017).....	14
<i>Cacace v. Meyer Mktg. (Macau Commercial Offshore) Co.</i> , 812 F. Supp. 2d 547 (S.D.N.Y. 2011)	20
<i>Cal. Inst. of Tech. v. Hughes Commc'ns Inc.</i> , 35 F. Supp. 3d 1176 (C.D. Cal. 2014)	19
<i>CCS Fitness, Inc. v. Brunswick Corp.</i> , 288 F.3d 1359 (Fed. Cir. 2002).....	2, 5
<i>CSB-Sys. Int'l Inc. v. SAP Am., Inc.</i> , No. 10-2156, 2011 WL 3240838 (E.D. Pa. July 28, 2011).....	20
<i>dunnhumby USA, LLC v. emnos USA Corp.</i> , No. 13-CV-0399, 2015 WL 1542365 (N.D. Ill. Apr. 1, 2015)	19
<i>Epos Techs. Ltd. v. Pegasus Techs. Ltd.</i> , 766 F.3d 1338 (Fed. Cir. 2014).....	12, 21
<i>Gen. Foods Corp. v. Studiengesellschaft Kohle mbH</i> , 972 F.2d 1272 (Fed. Cir. 1992).....	2
<i>Home Diagnostics, Inc. v. LifeScan, Inc.</i> , 381 F.3d 1352 (Fed. Cir. 2004).....	14
<i>Honeywell Inc. v. Victor Co. of Japan, Ltd.</i> , 298 F.3d 1317 (Fed. Cir. 2002).....	6

TABLE OF AUTHORITIES

PAGE

<i>Inline Plastics Corp. v. EasyPak, LLC</i> , 799 F.3d 1364 (Fed. Cir. 2015).....	7
<i>InterDigital Commc'ns, LLC v. Int'l Trade Comm'n</i> , 690 F.3d 1318 (Fed. Cir. 2012).....	5, 15
<i>Intergraph Hardware Techs. Co. v. Toshiba Corp.</i> , 508 F. Supp. 2d 752 (N.D. Cal. 2007).....	20
<i>Kaneka Corp. v. Xiamen Kingdomway Grp., Co.</i> , 790 F.3d 1298 (Fed. Cir. 2015).....	7
<i>Kara Tech. Inc. v. Stamps.com Inc.</i> , 582 F.3d 1341 (Fed. Cir. 2009).....	15
<i>Laitram Corp. v. NEC Corp.</i> , 163 F.3d 1342 (Fed. Cir. 1998).....	2
<i>Markman v. Westview Instruments, Inc.</i> , 517 U.S. 370 (1996)	1, 20
<i>Merrill v. Yeomans</i> , 94 U.S. 568 (1876)	2
<i>Nat'l Prods. Inc. v. Belkin Int'l, Inc.</i> , No. C16-402, 2017 WL 3084435 (W.D. Wash. July 19, 2017).....	6
<i>Nautilus, Inc. v. Biosig Instruments, Inc.</i> , 572 U.S. 898 (2014).....	19
<i>O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co., Ltd.</i> , 521 F.3d 1351 (Fed. Cir. 2008).....	9, 17
<i>Oatey Co. v. IPS Corp.</i> , 514 F.3d 1271 (Fed. Cir. 2008).....	5
<i>Personalized Media Commc'ns, LLC v. Int'l Trade Comm'n</i> , 161 F.3d 696 (Fed. Cir. 1998).....	19
<i>Phillips v. AWH Corp.</i> , 415 F.3d 1303 (Fed. Cir. 2005) (<i>en banc</i>)	1, 2

TABLE OF AUTHORITIES

		PAGE
3	<i>Plantronics, Inc. v. Aliph, Inc.</i> ,	
4	724 F.3d 1343 (Fed. Cir. 2013).....	15
5	<i>Prima Tek II, L.L.C. v. Polpap S.A.R.L.</i> ,	
6	318 F.3d 1143 (Fed. Cir. 2003).....	7
7	<i>Rexnord Corp. v. Laitram Corp.</i> ,	
8	274 F.3d 1336 (Fed. Cir. 2001).....	5, 15
9	<i>Sonix Tech. Co., Ltd. v. Publications Int’l, Ltd.</i> ,	
10	844 F.3d 1370 (Fed. Cir. 2017).....	19
11	<i>Sulzer Textil A.G. v. Picanol N.V.</i> ,	
12	358 F.3d 1356 (Fed. Cir. 2004).....	4, 9
13	<i>Thorner v. Sony Computer Entm’t Am. LLC</i> ,	
14	669 F.3d 1362 (Fed. Cir. 2012).....	5
15	<i>Vanderlande Indus. Nederland BV v. Int’l Trade Comm’n</i> ,	
16	366 F.3d 1311 (Fed. Cir. 2004).....	7
17	<i>Vehicular Techs. Corp. v. Titan Wheel Int’l, Inc.</i> ,	
18	141 F.3d 1084 (Fed. Cir. 1998).....	2
19	<i>Virnetx, Inc. v. Cisco Sys., Inc.</i> ,	
20	767 F.3d 1308 (Fed. Cir. 2014).....	4
21	<i>Vitronics Corp. v. Conceptiontronic, Inc.</i> ,	
22	90 F.3d 1576 (Fed. Cir. 1996).....	12, 21
23	Statutes	
24	35 U.S.C. § 112 ¶ 2.....	2
25	Other Authorities	
26	<i>Black’s Law Dictionary</i> (10th ed. 2014).....	24

1 I. INTRODUCTION

2 Plaintiffs (“BN3TH”) and Defendants (“Rampion”) compete in the market for comfortable
 3 men’s undergarments with supportive pocket technology. BN3TH created the technology in 2009
 4 and 2010. In late 2010, Rampion became a distributor of BN3TH’s undergarments which were then
 5 sold under the brand “MyPackage.” After the parties ceased doing business together, Rampion
 6 introduced a competing brand called 2UNDR, which was developed using BN3TH’s proprietary
 7 technical specifications and with knowledge of BN3TH’s then-pending patent applications.
 8 BN3TH’s U.S. patents recently issued, leading to this lawsuit seeking to stop Rampion’s ongoing
 9 and willful patent infringement.

10 The technology at issue—comfortable and supportive men’s undergarments—and the
 11 terminology used in U.S. Patent Nos. 9,687,030 (“the ’030 patent”) and 10,034,496 (“the ’496
 12 patent”) (“Asserted Patents”) are familiar and easily understood. The underwear claimed in the
 13 Asserted Patents includes new features in novel combinations, but the basic use, functionality, and
 14 structure of men’s underwear are widely known, making the Asserted Patents’ advances over the
 15 prior art readily apparent. Despite the accessible subject matter and terminology, claim construction
 16 is contentious because Rampion, caught with its hand in the cookie jar, if force to advocate
 17 unfounded claim construction positions to try to prop up its tactical positions in litigation. For
 18 example, in an effort to distinguish its accused products as outside the scope of the patent claims,
 19 Rampion seeks to unduly narrow certain claim terms by importing limitations from mere examples in
 20 the specification. As shown below, Rampion’s claim constructions are unsupported by law or the
 21 intrinsic record, and if adopted would lead to legal error.

22 II. LEGAL STANDARDS FOR CLAIM CONSTRUCTION

23 A patent consists of two parts: (1) the specification, which includes the drawings and
 24 explanatory text, and (2) the numbered claims. The claims define the scope of the patent. Via claim
 25 construction, the Court resolves any disputes as to claim scope, so the jury can decide disputed
 26 questions of fact. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 387 (1996); *Phillips v.*

1 *AWH Corp.*, 415 F.3d 1303, 1311-12 (Fed. Cir. 2005) (*en banc*).

2 The starting point for any claim construction is the language of the claims themselves.
 3 *Vehicular Techs. Corp. v. Titan Wheel Int'l, Inc.*, 141 F.3d 1084, 1089 (Fed. Cir. 1998). Patent
 4 claims and their limitations “define or delimit the scope of the ... patent ‘monopoly.’” *Gen. Foods*
 5 *Corp. v. Studiengesellschaft Kohle mbH*, 972 F.2d 1272, 1274 (Fed. Cir. 1992). Claims are therefore
 6 “‘of primary importance, in the effort to ascertain precisely what it is that is patented.’” *Phillips*, 415
 7 F.3d at 1312 (quoting *Merrill v. Yeomans*, 94 U.S. 568, 570 (1876)).

8 Because claim language is required to “particularly point[] out and distinctly claim[] the
 9 subject matter which the applicant regards as his invention,” 35 U.S.C. § 112 ¶ 2 (pre-AIA), and
 10 because it provides the only explicit notice to the world of the scope of the monopoly, there is a
 11 “‘heavy presumption’ that a claim term carries its ordinary and customary meaning,” *CCS Fitness,*
 12 *Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002) (citation omitted). The “ordinary and
 13 customary meaning” refers to the understanding of a person of ordinary skill in the art (“POSA”).
 14 See, e.g., *Laitram Corp. v. NEC Corp.*, 163 F.3d 1342, 1346 (Fed. Cir. 1998). The understanding of a
 15 claim term to a POSA must be considered “not only in the context of the particular claim in which
 16 the disputed term appears, but in the context of the entire patent, including the specification.”
 17 *Phillips*, 415 F.3d at 1313.

18 **III. ARGUMENT**

19 **A. Overview of the Asserted Patents**

20 The Asserted Patents are part of a single patent family: the ’496 patent is a child of the ’030
 21 patent. The application that led to the ’496 patent is a continuation of, and claims priority through,
 22 the application that led to the ’030 patent. Both patents claim priority back to U.S. Provisional Patent
 23 Application No. 61/429,065, which was filed on December 31, 2010.

24 Both patents are directed to a men’s undergarment, the body of which includes a front portion
 25 and a back side joined to a waistband via a waistband seam. The body also includes leg openings for
 26 the wearer’s legs. In the area adjacent to the wearer’s crotch, the bottom of the front portion and the

bottom of the back side are each attached to a third panel of fabric (a crotch panel), which is also part of the body of the undergarment. The seam where the crotch panel attaches to the front portion is referred to as the “first seam.”

Inside this body of the underwear described in Claim 1 of each Asserted Patent, a stretch panel made from elastically resilient four-way stretch material is attached to the front portion at the top, bottom, and side edges of the stretch panel. The stretchy material of the stretch panel pulls

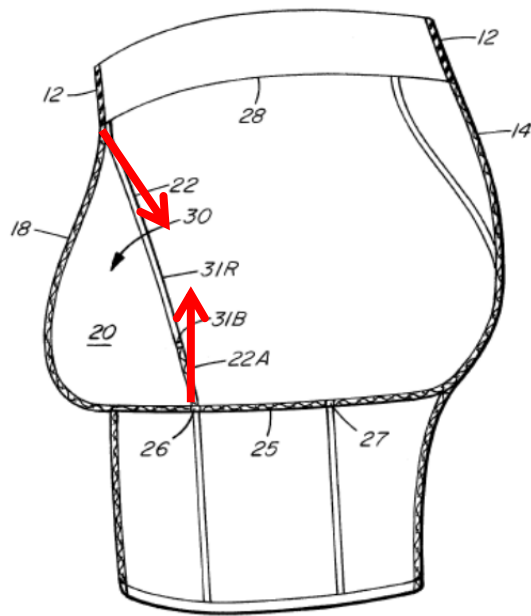


FIG. 7

together (gathers) the four edges where it is attached to the front portion of the body of the underwear, pulling what would otherwise be a relatively flat surface of the front portion into a three-dimensional pouch structure. For example, the side cross-section view shown in Fig. 7 of both Asserted Patents (annotated at left) shows how the stretch panel (22) pulls together (gathers) the front portion (18) from top to bottom to make that relatively flat fabric panel into a three-dimensional pouch (20). The stretch panel likewise pulls together (gathers)

the front panel into a pouch from side to side. There is an opening in the stretch panel through which the wearer’s genitals are easily inserted when putting on the underwear, such that the wearer’s genitals are held and supported in the pouch structure, and supported from behind and below by the stretch panel. *See* ’496 patent, Claim 1 & Figs. 1-8; ’030 patent, Claim 1 & Figs. 1-8.

The key difference between Claim 1 of the two Asserted Patents—and the reason BN3TH has asserted each Asserted Patent against different accused products—is that Claim 1 of the ’030 patent requires that the top edge of the stretch panel attach to the front portion at the waistband seam, and the bottom edge attach to the front portion at the first seam. In contrast, Claim 1 of the ’496

patent was lacks this requirement, instead coining the term “top location” for wherever the top edge of the stretch panel attaches to the front portion, and the term “bottom location” for wherever the bottom edge of the stretch panel attaches to the front portion.

B. “Front Portion” (Joint Claim Chart (ECF No. 47-1) (“JCC”) at 1-23)

BN3TH: Region of the garment’s body that is situated in front of the wearer when the garment is worn and to which the stretch panel is attached to form a concave space between the front portion and the stretch panel capable of receiving the wearer’s genitals

Rampion: The outermost layer of fabric of the body of the male garment bounded by the side seams, waistband seam, and first seam.

The term “front portion” has a readily understood meaning as explained both in the Asserted Patents¹ and in the field of garment design and production. Nevertheless, Rampion tries to prop up its noninfringement position by improperly narrowing this term in two ways: (1) adding “outermost layer of fabric” in an effort to distinguish Rampion’s accused products, which have a two-layer “front portion,” and (2) artificially restricting the definition of “front portion” to only a small part of the front of the undergarment. Nothing in the intrinsic or extrinsic evidence supports such narrowing the scope of “front portion.”

Claim construction starts with the full breadth of the plain and ordinary meaning of the claim language itself to a POSA. *Virnetx, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1316 (Fed. Cir. 2014). Nothing in the claim language, either the words “front portion” or the surrounding text of the claim, requires the front portion to be the single “*outermost layer of fabric*” in the body of the garment, as Rampion proposes. Rather, the claim suggests only that the front portion is the part of the body of the garment that is situated in front of the wearer.² See, e.g., ’496 Patent, Claim 1 (“a body including a

¹ The two Asserted Patents share substantially the same specification. Except where otherwise indicated, citations to “Specification” or “Spec.” herein are to the specification of the ’030 patent. The corresponding disclosure in the ’496 patent is cited in BN3TH’s column of the JCC, Dkt. 47-1.

² The last clause of BN3TH’s proposed construction of “front portion” (“and to which the stretch panel is attached to form a concave space between the front portion and the stretch panel capable of receiving the wearer’s genitals”), reflects surrounding claim language from independent Claim 1 of each Asserted Patent and is included in the proposed construction to aid the trier of fact in understanding how the front portion and stretch panel interact in the claimed invention. Providing such context to lay jurors avoids potential juror confusion is an important aspect of claim construction. See *Sulzer Textil A.G. v. Picanol N.V.*, 358 F.3d 1356, 1366 (Fed. Cir. 2004) (“[T]he district court

front portion and having leg openings for a wearer's legs" and "a stretch panel attached to the body inside the front portion, the stretch panel . . . having a top edge attached to the body at a top location, a bottom edge attached to the body at a bottom location, side edges attached to the body at side seams . . ."); *see also, e.g.,* '030 patent Claim 1. Likewise, the plain and ordinary use of "front" and "front portion" in the garment industry describes the portion of a garment *situated in front of the wearer*. *See* JCC Ex. 8 (*Practical Guide to Patternmaking for Fashion Designers: Menswear*, at 85, 124, 145, 160-61). Usage in the industry also demonstrates that such a "front portion" of a garment can comprise *multiple* panels or layers, not just the single outermost layer as Rampion urges here. *Id.* at 124 (describing as "front" of men's shorts an area disposed in front of the wearer and comprising two separate fabric panels partially overlapping and stitched together).

Claim language is entitled to the full breadth of its plain and ordinary meaning, unless the specification or prosecution history mandates a narrower construction. *InterDigital Commc'ns, LLC v. Int'l Trade Comm'n*, 690 F.3d 1318, 1324 (Fed. Cir. 2012) (reversing International Trade Commission's narrow construction of the claim element "code" where "[n]either the specification nor the prosecution history contains a restrictive definition of 'code'"). Absent a clear definition or disavowal of scope, claim terms are entitled to the full scope of their ordinary meaning. *CCS Fitness*, 288 F.3d at 1366-69 (reversing district court construction as unduly narrow because specification did not define or disclaim the scope of the claim language); *Oatey Co. v. IPS Corp.*, 514 F.3d 1271, 1275-77 (Fed. Cir. 2008) (same); *Thorner v. Sony Computer Entm't Am. LLC*, 669 F.3d 1362, 1367 (Fed. Cir. 2012). Even where the specification of the patent describes only one exemplary embodiment, patent claims with broader meaning are not limited to that embodiment. *See, e.g., Rexnord Corp. v. Laitram Corp.*, 274 F.3d 1336, 1343-44 (Fed. Cir. 2001) (reversing district court's claim construction that required claimed components to be physically separate because plain meaning of claim language could encompass either separate or integral structures). When the

must instruct the jury on the meanings to be attributed to all disputed terms used in the claims in suit so that the jury will be able to intelligently determine the questions presented." (internal quotation marks and citation omitted)).

1 specification uses a term in a variety of ways, such usage “attests to the breadth of [the] term.”

2 *Anchor Wall Sys., Inc. v. Rockwood Retaining Walls, Inc.*, 340 F.3d 1298, 1308 (Fed. Cir. 2003).

3 Here, the prosecution history of the '030 patent expressly describes, using the claim phrase at
 4 issue, a men’s undergarment with a “front portion” that is made from **two layers** (*i.e.*, an inner and
 5 outer layer of the front portion), both of which the patentee described as part of the “front portion.”
 6 JCC Ex. 3 at 63-64 ('030 Pros. Hist., Oct. 25, 2013 Resp. to Office Action) (“Reis does not disclose
 7 ‘the front portion being gathered from side-to-side and top-to-bottom by the stretch panel whereby a
 8 three-dimensional pouch is defined between the stretch panel and the front portion’. Rather, Reis
 9 discloses the **two layers** of material **in the front portion** being stitched together in such a way as to
 10 give a shape to the overall article” (emphases added)). This discussion in the prosecution
 11 history of a **two-layer “front portion”** is directly contrary to Rampion’s proposal that only the
 12 **“outermost” layer** of fabric can be the “front portion.” *See Honeywell Inc. v. Victor Co. of Japan,*
 13 *Ltd.*, 298 F.3d 1317, 1323-24 (Fed. Cir. 2002) (discussion in prosecution history made clear that
 14 inventor intended broader meaning of “contiguous,” not more common narrower meaning of the
 15 term, such that the broader meaning was the proper construction); *Nat’l Prods. Inc. v. Belkin Int’l,*
 16 *Inc.*, No. C16-402, 2017 WL 3084435, at *7 (W.D. Wash. July 19, 2017) (examples discussed in
 17 prosecution history demonstrated that the words “joined between” did not require physical contact on
 18 both sides of the rib component and, as such, proposed narrowing construction requiring such contact
 19 was improper).

20 The Specification also contemplates that the front portion may have a multi-part construction
 21 to accommodate a fly opening. Spec. at 2:34-48. More telling, the Specification expressly and
 22 repeatedly calls out **both the outer surface and the inner surface** of the front of the body of the
 23 underwear as being part of the “front portion,” including an arrow that points through the opening in
 24 the stretch panel to call the *inside surface* of the pouch a part of the “front portion” of the body of the
 25 underwear. Spec. at 2:1-2 & Figs. 3-4 (showing “front portion” as item 18). These varied examples
 26 from the Specification and prosecution history demonstrate the breadth of the term “front portion”

1 and show that Rampion’s proposal to limit the front portion to the “outermost layer of fabric” is not
 2 how a POSA would understand the term in light of the Specification. *See Prima Tek II, L.L.C. v.*
 3 *Polpap S.A.R.L.*, 318 F.3d 1143, 1151 (Fed. Cir. 2003) (holding that varied specification examples
 4 “demonstrate[] the breadth of the term rather than providing a limited definition,” and holding that
 5 claim term “floral holding material,” subject to various *examples* in specification, should be
 6 understood broadly to include a material of *any* shape or type); *Inline Plastics Corp. v. EasyPak,*
 7 *LLC*, 799 F.3d 1364, 1371 (Fed. Cir. 2015) (reversing district court construction of “frangible
 8 section” as requiring at least two score lines where the specification described an example with a
 9 single score line as an alternative embodiment); *Kaneka Corp. v. Xiamen Kingdomway Grp., Co.*,
 10 790 F.3d 1298, 1305 (Fed. Cir. 2015) (reversing construction of “sealed” as requiring prevention of
 11 entry/exit of any materials, where specification included discussion of examples where solvents
 12 could enter/ exit tank and sealing of tank merely prevented exposure of contents to the atmosphere).

13 In contrast, Rampion relies on narrower individual definitions selected from among broader
 14 definitions in *general-purpose* dictionaries of the single term “front,” *see* JCC at 22-23 (Rampion
 15 citing JCC Exs. 9-12). But the same general-purpose dictionary definitions of “front” contain other
 16 definitions **consistent** with the use of “front portion” in the Specification and the prosecution history
 17 as the part of the garment in front of the wearer. This demonstrates that BN3TH’s construction is
 18 more consistent with the full breadth of the ordinary meaning of “front.”³ In any event, even if the
 19 general-purpose definition of “front” was limited to “outermost” (it is not), Rampion errs by relying
 20 on general-purpose definitions of “front” to narrow the plain and ordinary meaning of “front portion”
 21 to a POSA in the garment industry. *See Vanderlande Indus. Nederland BV v. Int’l Trade Comm’n*,
 22 366 F.3d 1311, 1321 (Fed. Cir. 2004) (where a POSA would understand a term differently in context,

23
 24 ³ *See, e.g.*, JCC Ex. 9 (definition of “front” includes “the part or side of anything that faces forward: *the front of a jacket*”
 25 and “in a forward place or position”); JCC Ex. 10 (definition of “front” includes “in a position close to the most forward or
 26 most important part”); JCC Ex. 11 (definition of “front” includes “[s]ituated at the front,” “[p]osition directly before or in
 the path of something,” and “[t]he foremost *or forward* part or surface of anything” (emphasis added)); JCC Ex. 12
 (definition of “front” includes “the part of a building, object, or person’s body which faces forward”). Nothing limits
 “front portion” to the single outermost layer of fabric.

that understanding of a POSA controls over general-purpose dictionaries, particularly where only a single example or portion of a definition from a general-purpose dictionary is relied upon).

Second, Rampion also attempts to improperly limit the “front portion” to the area of the body of the men’s undergarment “bounded by the side seams, waistband seam, and first seam.” JCC at 1. This limitation is inconsistent with the actual language of Claim 1 of both Asserted Patents. The ’030 patent claims state that the *stretch panel*—not the front portion—has outer edges defined by the side seams (on the sides *of the stretch panel*) and the waistband and first seam (on the top and bottom of the stretch panel), respectively.⁴ ’030 patent Claim 1. Nothing about the plain meaning of “front portion,” which as discussed above is used to describe the part of a garment disposed in front of the wearer, limits “front portion” to the small part of the front of the garment that is between the four seams Rampion has selected. Furthermore, the plain meaning of “front portion” urged by BN3TH is entirely consistent with Fig. 4 of the Specification, which shows the “front portion,” Spec. at 2:1-2 (“FIG. 4 is an enlarged view of the front portion of the undershorts of FIG. 1 viewed from inside.”), as extending clearly beyond the side seams and including the adjacent material outside the side seams.

For all these reasons, the “front portion” should be construed, consistent with the full breadth of its plain and ordinary meaning to a POSA, as the “region of the garment’s body that is situated in front of the wearer when the garment is worn and to which the stretch panel is attached to form a concave space between the front portion and the stretch panel capable of receiving the wearer’s genitals.”

C. “Stretch Panel” (JCC at 71-82)

<p>BN3TH: Four-way stretch material separate from and joined to the inside of the garment’s body that includes an opening for the wearer’s genitals.</p>	<p>Rampion: Plain and ordinary meaning.</p>
---	--

⁴ The claims of the ’496 patent, in contrast, were specifically amended to be broader, and call for the top and bottom of the stretch panel to end at a “top location” and a “bottom location,” which need not be precisely at the waistband seam or first seam, as discussed in detail in Section III.E., below.

1 BN3TH seeks to construe “stretch panel” consistent with the surrounding language in the
2 claims and with the descriptions of the structure of the stretch panel in the Specification. Instructing
3 the jury only that “stretch panel” carries its “plain and ordinary meaning” without providing any
4 indication of what that meaning is, as Rampion urges, would be unhelpful to the trier of fact.
5 “Stretch panel” is not a phrase that jurors are likely to be familiar with outside of this case.
6 Accordingly, construing this phrase with an explanation of its meaning would aid the trier of fact.
7 *Sulzer Textil A.G. v. Picanol N.V.*, 358 F.3d 1356, 1366 (Fed. Cir. 2004) (“[T]he district court must
8 instruct the jury on the meanings to be attributed to all disputed terms used in the claims in suit so
9 that the jury will be able to intelligently determine the questions presented.” (internal quotation marks
10 and citation omitted)).

11 In any event, Rampion’s position that this term needs no construction conceals a real dispute
12 between the parties as to the meaning of “stretch panel.” While BN3TH contends that, consistent
13 with the Specification, the stretch panel must be four-way stretch material *separate from* and joined
14 to the *inside* of the garment’s body, Rampion has asserted that prior art references contain a “stretch
15 panel” that is *part of* or located *outside* of the body of the undergarment. *See, e.g.*, ECF No. 34-3
16 (Jan. 28, 2019 Invalidity Contentions, Table B-1 at 24 to 34 of 100 (discussing U.S. Patent
17 Publication No. 2004/0025218)). Because there is a live dispute between the parties as to the
18 meaning and breadth of the claim phrase “stretch panel,” Rampion’s position that this term need not
19 be construed is legally erroneous. *O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co., Ltd.*, 521 F.3d
20 1351, 1360 (Fed. Cir. 2008) (“[w]hen the parties raise an actual dispute regarding the proper scope
21 of these claims, the court, not the jury, must resolve that dispute,” even if one or both parties assert
22 that no express construction is necessary because the term has a plain and ordinary meaning).

23 The context of the claim language itself is clear and specific in requiring that the “stretch
24 panel” be separate, elastically resilient four-way stretch material “attached to the body inside the
25 front portion” (of the body). *See, e.g.*, ’030 patent Claim 1 (requiring “a body” including both “a
26 front portion” and “a crotch panel,” but describing the “stretch panel” as “attached to the body inside

the front portion”—*not* as part of the structures forming the body of the male garment). The Specification and prosecution history likewise confirm this construction of “stretch panel” as separate material attached inside of the body of the garment. *See, e.g.*, Spec. at Figs 1-16, Abstract (“Next-to-skin garments for men include an internal stretch panel.”), 2:15-16 (“FIG. 16 shows a stretch panel before and during being sewn into a garment.”), 3:34-38 (“Thus the illustrated undershorts are one example of a men's garment comprising: a waistband; a front wall 35 depending downwardly from the waistband, **a stretch panel attached behind the front wall** so that the fron[t] wall and stretch panel provide a pouch . . .” (emphasis added)); *see also* JCC at 71-74 (BN3TH column, providing additional citations and summary of supporting passages in Specification and prosecution history). Similarly there is no question that all claims of the Asserted Patents require an aperture in the stretch panel to allow insertion of the wearer’s genitals through the stretch panel opening and into the pouch. *See, e.g.*, Spec. at Figs. 1-16, Abstract (“An opening in the stretch panel receives a wearer’s external genitalia.”), 1:34-56 (the garment of the invention includes “a stretch panel having an opening for receiving a wearer’s genitals”); *see also* JCC at 71-74 (additional examples). Moreover, usage of “panel” in the garment industry is consistent with the intrinsic record and also refers to a “panel” as a **separate** piece of fabric, attached by seams to adjacent material. *See* JCC Ex. 50 (*The Practical Guide to Patternmaking for Fashion Designers: Menswear*, at 5, 97-98, 147, 152, 157, 172, 173).

Adoption of BN3TH’s proposed construction of “stretch panel” is appropriate to resolve the parties’ dispute and establish that structures that are **part of** the body of the garment or are located **outside** the body of the garment are not a separate “stretch panel” as required by the claims of the Asserted Patents.

D. “Gathered from Side-to-Side and Top-to-Bottom by the Stretch Panel” (JCC at 50-63)

BN3TH: Plain and ordinary meaning; <i>in the alternative</i> : the front portion of the garment’s body is drawn up both horizontally and vertically through attachment to the stretch panel, creating a concave space between the stretch panel and the front portion of the garment’s body capable	Rampion: Puckered by the stretch panel along each of the side, waistband, and first seams.
--	---

1 of receiving the wearer's genitals when the garment is worn.	
--	--

2 As discussed above, the claim language of Claim 1 of each Asserted Patent describes that the
 3 stretch panel, due to its elastic four-way stretch properties, gathers (*i.e.*, pulls together, draws up) the
 4 parts of the front portion attached to the top, bottom, and side edges of the stretch panel. By pulling
 5 together these edges, the stretch panel lifts the otherwise relatively flat front portion into a more
 6 three-dimensional pouch shape, and creates a three-dimensional space between the (now curved)
 7 front portion and the stretch panel. For example, Claim 1 of the '496 patent requires, in part:

8 [T]he stretch panel being resiliently elastic both in a direction between the top edge
 9 and the bottom edge and in a direction between the side edges, the stretch panel
 10 having a length when unstretched smaller than a length measured along the front
 11 portion between the top and bottom locations and a width when unstretched smaller
 12 than a width measured along the front portion between the side seams such that the
 front portion is gathered from side-to-side and top-to-bottom by the stretch panel and
 defines a three-dimensional pouch between the stretch panel and the front portion

13 The vertical aspect (top-to-bottom) of this drawing up of the front portion by the stretch panel is
 14 clearly illustrated in Fig. 7 of both Asserted Patents (reproduced and annotated in Section III.A.,
 15 above). This concept is also repeatedly described in the Specification.⁵ The claim language, in
 16 context, uses “gathered” only in its general, everyday sense, not in any technical sense.

17 Rampion, however, claims that “gathered from side-to-side and top-to-bottom by the stretch
 18 panel” means that the fabric of the undergarment must be “[p]uckered . . . along each of the side,
 19 waistband, and first seams.” This construction lacks any support in the Specification or elsewhere in
 20 the intrinsic record. Indeed, Rampion’s proposed construction is flatly inconsistent with, and would
 21 read out, the embodiments actually disclosed in the Specification. Nothing in the Specification
 22 mentions puckering, or any synonym for puckering, as occurring, much less being required to occur,
 23 along the side, top, and bottom seams attaching the stretch panel to the front portion. Certain figures

24 _____
 25 ⁵ See, e.g. Spec. at 4:22-24 (“The two-way elasticity of stretch panel 22 helps to gather the material of front portion 18 of
 26 body 14 to increase the volume of pouch 20.”); 6:13-18(“After assembly, stretch panel 22 can contract. This gathers the
 material of front portion 18 and helps to form pouch 20 to have a three-dimensional volume”); see also JCC at 51-52
 (citing and summarizing additional discussion in Specification and prosecution history).

of the '030 patent show some wrinkling of material that perhaps could be described as puckering, but that wrinkling is shown in the middle of the fabric panels, and never along the seams that connect the stretch panel to the front portion. '030 patent Figs. 9-15. None of the stretch panel seams of any embodiment described or depicted anywhere in either Asserted Patent features any puckering; instead each seam captured in the figures is shown as being flat and smooth. *See* '030 patent Figs. 1-16; '496 patent Figs. 1-9. Rampion's proposed construction is legally improper, as it would read out all preferred embodiments discussed and depicted in the Specification, none of which include the "puckering" Rampion contends is required. *See Epos Techs. Ltd. v. Pegasus Techs. Ltd.*, 766 F.3d 1338, 1347 (Fed. Cir. 2014) (reversing district court's construction "because it reads out preferred embodiments"); *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1583 (Fed. Cir. 1996) (a claim construction so narrow as to exclude the principal preferred embodiments "is rarely, if ever, correct and would require highly persuasive evidentiary support").

Rampion's proposed construction is also erroneous because it would require the top of the stretch panel to attach to the front portion of the body at the "waistband seam" and the bottom of the stretch panel to attach to the front portion of the body at the "first seam," which is inconsistent with the claims of the '496 patent, as discussed below. *See infra* Section III.E.

For all of these reasons, BN3TH's proposed construction of this phrase should be adopted, and Rampion's proposed construction rejected.

E. "Top Location" / "Bottom Location" (JCC at 24-32)

BN3TH: Top Location: Plain and ordinary meaning; <i>in the alternative:</i> region where the top edge of the stretch panel is attached to the front portion of the body of the garment.	Rampion: Top Location: The seam connecting the body of the male garment and the stretch panel to the waistband.
BN3TH: Bottom Location: Plain and ordinary meaning; <i>in the alternative:</i> region where the bottom edge of the stretch panel is attached to the front portion of the body of the garment.	Rampion: Bottom Location: The seam connecting the crotch panel and the stretch panel to the front portion.

As discussed above, *see supra* Section III.A., the sole independent claim of the '030 patent requires the top edge of the stretch panel to attach to the front portion at the waistband seam, and the

bottom edge of the stretch panel to attach to the front portion at the first seam, where the front portion is joined to the crotch panel. '030 patent Claim 1. Claim 1 of the '496 patent is nearly identical to Claim 1 of the '030 patent in most respects, but it drops the requirement that the top edge of the stretch panel must attach at the waistband seam, and that the bottom edge of the stretch panel must attach at the first seam. JCC Ex. 5 at 45-51 (February 6, 2018 claim amendment). Instead, Claim 1 of the '496 patent was amended to use the new term "top location" to refer to the location where the top edge of the stretch panel is attached to the front portion, and the new term "bottom location" to refer to the location where the bottom edge of the stretch panel is attached to the front portion. *Id.*; *see also* '496 patent Claim 1. Below is the redline of the key portion of this claim amendment provided to the U.S. Patent and Trademark Office, highlighting the broadening change to the claim language (JCC Ex. 5 at 46):

a stretch panel attached to the body inside the front portion, the stretch panel comprising a sheet of elastically resilient four-way stretch material having a top edge attached to the body at ~~the waistband seam~~ a top location, a bottom edge attached ~~to the first seam~~ body at a bottom location, side edges attached to the body at side seams extending substantially continuously along ~~with either~~ either side of the front portion ~~from the first seam to the waistband seam~~ and an opening for receiving a wearer's genitals, the opening having a rounded bottom edge and opposing side edges that are spaced apart from one another on either side of the opening;

Certain of Rampion's accused products are constructed such that the top edge of the stretch panel is attached just below, rather than at, the waistband seam. Accordingly, Rampion seeks to rewrite Claim 1 of the '496 patent as if the amendment to the claim language never took place. Rampion proposes exactly the same definition for "waistband seam" and "top location" (*see* JCC at 24, 86 ("The seam connecting the body of the male garment and the stretch panel to the waistband")), and exactly the same definition for "first seam" and "bottom location" (*see* JCC at 28, 90 ("The seam connecting the crotch panel and the stretch panel to the front portion")). In doing so, Rampion conveniently ignores the fact that Claim 1 of the '496 patent was amended to be different in

1 scope from Claim 1 of the '030 patent, and the amended Claim 1 of the '496 patent was accepted and
2 approved by the U.S. Patent and Trademark Office.

3 No legal authority supports Rampion's effort to use claim construction to reverse an
4 amendment to the claim language made during prosecution. To the contrary, a POSA familiar with
5 the claims, Specification, and prosecution history would readily understand that the language of
6 Claim 1 of the '496 patent was changed to differ from the language of Claim 1 of the '030 patent
7 because Claim 1 of the '496 patent was intended by the applicant and the examiner to have a
8 different, and broader, substantive scope. *See Home Diagnostics, Inc. v. LifeScan, Inc.*, 381 F.3d
9 1352, 1358 (Fed. Cir. 2004) (changes in claim language in later generations of patents in the same
10 family, from "predetermined time period" to "predetermined incubation period" and then to "suitably
11 stable endpoint," proved that later patents were intended to have a different, and broader, claim scope
12 than their predecessors). The prosecution history confirms this understanding. During prosecution
13 of the '496 patent, the patent examiner issued an office action that included a statutory double
14 patenting rejection, rejecting all claims (before amendment) because at that time they were identical
15 to the claims of the '030 patent. BN3TH made its amendment to the claims, discussed above, on
16 February 6, 2018, in response to this office action. By doing so it overcame this double patenting
17 rejection, confirming that the patent examiner understood (as a POSA reviewing the prosecution
18 history would understand) BN3TH's amendments to change the scope of the claims of the '496
19 patent to make them different from the claims of the '030 patent. *See JCC Ex. 5* at 45-51 (February
20 6, 2018 amendment and comments responding to double patenting rejection). Withdrawal of a
21 statutory double patenting rejection after amendment establishes that there is a difference in scope
22 between the original and amended claims. *See AstraZeneca AB v. Andrx Labs, LLC*, No. 14-8030,
23 2017 WL 111928, at *45 (D.N.J. Jan. 11, 2017).

24 Further, Rampion's mere copying of the constructions of "waistband seam" and "first seam"
25 as its proposed constructions for "top location" and "bottom location" makes Rampion's proposed
26 constructions inconsistent with the plain meaning of the claim language itself. Contrary to

Rampion’s proposed constructions, the plain meaning of “location” in top and bottom locations is a place or region of the garment, not a “seam.” JCC Exs. 26-28 (dictionary definitions of “location” as a region or place). The plain meaning of top and bottom locations is consistent with BN3TH’s construction, as these terms refer to the region (location) where each of the top and bottom edges of the stretch panel is attached. JCC Ex. 29 (treatise *Patternmaking for Fashion Design* describing as “top section” the entire upper part of a garment, not merely the top edge); *see also* JCC Exs. 23-25, 30-32 (defining “top” and “bottom” to include the highest and lowest points as well as the upper and lower parts of an item).

Finally, Rampion’s justification for its redrafting of Claim 1 of the ’496 patent is erroneous as a matter of law. It is legal error to narrow claim language to import a feature of exemplary embodiments as a requirement into claims that are written more broadly. This is true even where *all* or the *only* exemplary embodiments described and depicted in a patent’s specification and figures happen to share a feature not expressly required by the claim language. *See InterDigital Commc’ns*, 690 F.3d at 1328 (holding that claim term “increased power level” covered step-wise power increases, as well as continuous increases, even where the specification described the latter but not the former); *id* at 1324 (holding that, since there was no definition of the term and no disavowal of claim scope, the claim term “code” could not be limited to the examples described in the specification); *Plantronics, Inc. v. Aliph, Inc.*, 724 F.3d 1343, 1350 (Fed. Cir. 2013) (“The patentee is entitled to the full scope of his claims, and we will not limit him to his preferred embodiment or import a limitation from the specification into the claims.” (quoting *Kara Tech. Inc. v. Stamps.com Inc.*, 582 F.3d 1341, 1348 (Fed. Cir. 2009))); *Rexnord*, 274 F.3d at 1343-44 (reversing district court’s claim construction that improperly limited scope of claims by importing feature shared by all disclosed embodiments in specification). Here, there is no basis upon which a POSA would read out the amendments to Claim 1 of the ’496 patent and rewrite the claims as Rampion suggests. BN3TH’s straightforward construction of top location and bottom location should be adopted.

F. “Substantially Continuously Along Either Side of the Front Portion” (JCC at 32-50)

<p>BN3TH: Plain and ordinary meaning; <i>in the alternative</i>: each side seam attaches one side edge of the stretch panel to the inside of the front portion of the garment's body.</p>	<p>Rampion: largely, but not necessarily wholly, uninterrupted along the entire length of each side of the front portion.</p>
--	--

The context of the claim phrase “substantially continuously along either side of the front portion” is important, as taken out of context this phrase may be misleading. This phrase occurs in Claim 1 of each Asserted Patent, and applies to the seams that attach the two outer side edges *of the stretch panel* to the front portion. *See, e.g.,* '496 patent Claim 1 (“*a stretch panel* attached to the body inside the front portion, *the stretch panel comprising . . . side edges attached to the body at side seams extending substantially continuously along either side of the front portion*” (emphases added)). Rampion’s proposed construction is inconsistent with the plain meaning of the claim language because it purports to require a seam running from the top to the bottom *of the front portion*, while the claim language is actually referencing a seam attaching the edge of the stretch panel to the front portion. (In other words, “substantially continuously” refers to the nature—not the length—of the stretch panel seam.) This distinction is critical, because this claim phrase is found in both Asserted Patents. As discussed above, the '496 patent only requires the stretch panel to extend vertically along a part of the front portion (from the top location to the bottom location), not all the way up and down the front portion. *See supra* Section III.E. Rampion’s proposed construction would improperly shoe-horn a requirement inconsistent with the proper scope of top location and bottom location into the meaning of “substantially continuously along either side of the front portion.”⁶

The Court could simply reject Rampion’s inaccurate proposed construction (thus resolving the parties’ dispute as to claim scope) and hold that this claim phrase carries its plain and ordinary meaning. If, however, the Court prefers to adopt a detailed construction of this phrase, BN3TH’s proposed construction is consistent with the context and plain meaning of the claim language, and

⁶ The first half of Rampion’s construction, “largely, but not necessarily wholly, uninterrupted” is not on its own necessarily inaccurate or inconsistent with BN3TH’s proposed construction, but as discussed in the preceding paragraph, the remainder of Rampion’s proposed construction (purporting to require the seam to extend the entire length of the front portion, rather than the entire length of the stretch panel) is inaccurate and makes Rampion’s construction as a whole misleading and inappropriate.

1 makes clear that the side seams at issue are located on the side edge of the stretch panel and attach
 2 the stretch panel to either side of the inside of the front portion. *See* JCC Exs. 33-36 (varied
 3 definitions showing the breadth of the plain meaning of continuous/continuously include, for
 4 example, “being in immediate connection or spatial relationship,” “to hold together, retain,” and
 5 “having but one direction”). BN3TH’s construction also comports with the Specification, which
 6 repeatedly describes that side seams attach the side edge of the stretch panel to the inside of the front
 7 portion of the garment’s body. *See, e.g.,* Spec. at 1:45-53, 2:59-60 (“Side edges of stretch panel 22
 8 are joined to front portion 18 of body 14 along seams 29 on either side of front portion 19.”); *see also*
 9 JCC at 32-33 (citing and summarizing additional supporting discussion in the Specification).

10 **G. “Crotch Panel” (JCC at 82-85)**

11 BN3TH: Fabric separate from and joined to both 12 the front portion and the back side of the 13 garment’s body, in the region that is adjacent to the wearer’s crotch when the garment is worn.	Rampion: Plain and ordinary meaning.
--	---

14 The parties’ dispute over the claim phrase “crotch panel” mirrors their dispute over “stretch
 15 panel,” discussed above. Rampion again seeks only a “plain and ordinary meaning” construction
 16 without disclosing what Rampion contends that meaning actually is. In contrast, BN3TH seeks to
 17 construe this term for the assistance of a trier of fact that might not be familiar with it, and to make
 18 clear that the “crotch panel” used in the Asserted Patents is required to be a separate fabric element
 19 attached via seams to the front portion and back side of the underwear body in the region adjacent to
 20 the wearer’s crotch. As with “stretch panel,” Rampion’s reliance on a plain meaning construction,
 21 without detailing what that meaning is, only obscures a dispute between the parties over whether the
 22 crotch panel is required to be a separate component of the body of the undergarment attached by
 23 seams to the front portion and the back side of the body. That dispute as to claim meaning and scope
 24 must be resolved by the Court, despite Rampion’s “plain and ordinary meaning” proposal. *See O2*
 25 *Micro*, 521 F.3d at 1360.

The context of the claim language requires that the “crotch panel” be a part of the body of the men’s undergarment composed of fabric separate from and joined to the front portion and back side of the body. *See, e.g.*, ’030 patent Claim 1 (“the body including a crotch panel . . . joined to the front portion along a first seam”). The Specification makes clear that the crotch panel is separate fabric joined to both the front portion and the rear side of the body. As discussed above, “panel” is used in the garment design industry to denote a separate fabric piece in a garment. *See* JCC Ex. 50 (examples of “panel” used consistently in industry treatise to denote a separate fabric piece joined to other pieces to construct a garment). More specifically, “crotch panel” is used in the undergarment design field to denote a separate fabric element interposed in the crotch region between the front and back panels of undergarments. *See* JCC Ex. 47 (U.S. Patent No. 5,081,716 (Lehenbauer) at Figs. 1-10, 2:8-18, 3:6-21). For these reasons, BN3TH’s construction is precisely how a POSA would understand the plain and ordinary meaning of “crotch panel,” and should be adopted.

H. “Asymmetrical Stretch Characteristics” (JCC at 63-65)

BN3TH: The amount of stretch of the fabric produced when force is applied in one direction differs from the amount of stretch produced when the same amount of force is applied to the fabric in a different direction.

Rampion: Indefinite.

Rampion argues that dependent Claim 2 of the Asserted Patents is invalid because the claim phrase “asymmetrical stretch characteristics” is indefinite and would not be understood sufficiently by a POSA in light of the intrinsic evidence. *See* JCC at 63 (Rampion’s position). Rampion argues indefiniteness even though that the Specification *expressly defines* “asymmetrical stretch characteristics.”

In some embodiments, the material of stretch panel 22 has asymmetrical stretch (i.e. the coefficient of elasticity of the material has a first value in a first direction in the plane of the material and a second value different from the first value in a second direction at right angles to the first direction in the plane of the material). The material may be oriented that it is easier to stretch the material of stretch panel 22 in a direction parallel to waistband 12 than it is to stretch the material in a direction perpendicular to waistband 12.

Spec. at 5:8-16. Rampion bears the burden to **prove** indefiniteness of any asserted patent claims—claims, and not claim phrases, are definite or indefinite—by clear and convincing evidence. *Sonix Tech. Co., Ltd. v. Publications Int’l, Ltd.*, 844 F.3d 1370, 1377 (Fed. Cir. 2017) (patent claims not proven indefinite). A patent claim is not indefinite unless it “fail[s] to inform, with reasonable certainty, those skilled in the art about the scope of the invention.” *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014). “Determining whether a claim is definite requires an analysis of whether [a POSA] would understand the bounds of the claim when read in light of the specification. . . . If the claims read in light of the specification reasonably apprise those skilled in the art of the scope of the invention, § 112 demands no more.” *Personalized Media Commc’ns, LLC v. Int’l Trade Comm’n*, 161 F.3d 696, 705 (Fed. Cir. 1998) (internal quotation marks and citation omitted; ellipsis in original); *Cal. Inst. of Tech. v. Hughes Commc’ns Inc.*, 35 F. Supp. 3d 1176, 1194 (C.D. Cal. 2014) (post-*Nautilus* holding that just because “a term covers broad possibilities does not render it indefinite, as long as a [POSA] can identify the outer boundaries, expansive though they may be”); *dunnhumby USA, LLC v. emnos USA Corp.*, No. 13-CV-0399, 2015 WL 1542365, at *14 (N.D. Ill. Apr. 1, 2015) (holding that the intrinsic record adequately defined objective boundaries as to the scope of “query template” even though the record did not limit the methods or media for creating the query template).

Here, there can be no dispute about whether a POSA would understand the meaning of the claim term “asymmetrical stretch characteristics,” because the meaning of that term is called out in the Specification, quoted above. *See* Spec. at 5:8-16; see also JCC Ex. 3 at 85-86 (Jan. 9, 2014 office action) (discussing materials that stretch only left-right or only up-down). BN3TH’s proposed construction rephrases this somewhat technical definition in language that is intended to be more accessible to the trier of fact, and consistent with the example application of the term (also quoted above) that follows the definition in the Specification.

Conversely, Rampion has offered no **evidence** to meet its burden to prove by clear and convincing evidence that a POSA, despite the express definition in the Specification and the example

1 in the Specification applying that definition, would somehow not understand the meaning of
2 “asymmetrical stretch characteristics.”

3 At a minimum, in the absence of any *evidence* of indefiniteness and in the face of an express
4 definition, there is no basis at the *Markman* stage, without full expert reports, discovery, and briefing,
5 for a finding of indefiniteness, particularly under the applicable heightened standard of proof. *CSB-*
6 *Sys. Int’l Inc. v. SAP Am., Inc.*, No. 10–2156, 2011 WL 3240838, at *20 n.16 (E.D. Pa. July 28,
7 2011) (“[T]he weight of the jurisprudence disfavor[ed] indefiniteness determinations at the *Markman*
8 stage of patent litigation.”).⁷

9 BN3TH’s construction should be adopted because it follows the express definition in the
10 Specification, but in language more accessible to the jury.

11 I. “Rectangular” (JCC at 65-68)

12 BN3TH: An exterior outline with four corners 13 and with one pair of edges significantly longer than the opposing pair of edges.	14 Rampion: The shape of a rectangle.
--	--

15 Fundamentally, the parties dispute whether the term “rectangular,” as used in dependent
16 Claim 3 of each Asserted Patent to describe the shape of the stretch panel, requires a precise
17 geometric “rectangle” (*i.e.*, four square corners and two sets of straight, parallel sides), as Rampion
18 asserts, or can apply to a shape reminiscent of a rectangle, as BN3TH asserts. JCC at 65-68.

19 BN3TH’s construction is consistent with the intrinsic and extrinsic evidence and the experience of a
20 POSA used to working with pieces of fabric that stretch and do not always maintain their original
21 shape with absolute perfection. In contrast, Rampion’s construction appears to be based on selective
22 designation of general-purpose dictionary definitions, even though it is flatly inconsistent with the
23 Specification.

24 ⁷ See also *Intergraph Hardware Techs. Co. v. Toshiba Corp.*, 508 F. Supp. 2d 752, 773 n.3 (N.D. Cal. 2007) (“[The]
25 indefiniteness argument is inappropriate at the claim construction stage.”); *Adapt Pharma Operations Ltd. v. Teva Pharm.*
26 *USA, Inc.*, No. 16-7721 et al., 2019 WL 1789463, at *4 (D.N.J. Apr. 24, 2019) (similar); *Cacace v. Meyer Mktg. (Macau*
Commercial Offshore) Co., 812 F. Supp. 2d 547, 560 (S.D.N.Y. 2011) (proof of indefiniteness requires evidence, not
attorney argument, and thus is better suited to the summary judgment context).

1 The plain, ordinary meaning of “rectangular” is broad enough to include *both* shapes that are
 2 strict geometric rectangles, and real-world shapes that bring to mind a rectangle because of some
 3 similarity to a rectangle, thus supporting BN3TH’s construction rather than Rampion’s. *See* JCC
 4 Exs. 46-47, 58-61 (each including some variation on “shaped like a rectangle”). Uses of
 5 “rectangular” in the garment industry apply to shapes that are not actual geometric rectangles but
 6 bring to mind a rectangle because they resemble the shape of a rectangle. *See* JCC Ex. 45 (the
 7 industry treatise and textbook *Patternmaking for Fashion Design*) (including examples of
 8 “rectangular” used to describe shapes that are clearly not literal geometric rectangles, such as the
 9 body shape of some persons, the profile of certain skirts, and the shape of certain jean pockets). That
 10 is precisely how the Specification uses “rectangular,” including describing the stretch panel of the
 11 embodiment of the invention shown in Figs. 1-8 as rectangular. *See* Spec. at 4:25-38, 4:44-49.

12 Further, the Specification recognizes that the stretch panel of this embodiment is *not* an
 13 absolute geometric rectangle, but is only similar to a rectangle in shape, because, for example, its top
 14 and bottom (shorter) sides are not equal in length to one another (and thus none of its corners are
 15 actually square). Spec. at 4:44-49. Thus, if Rampion’s construction requiring a rectangular shape to
 16 be “the shape of a rectangle” was adopted, the very example of a rectangular stretch panel identified
 17 as a *preferred embodiment* in the Specification would be excluded from the scope of “rectangular” in
 18 the claims. Such a construction that reads out the preferred embodiment is legal error. *Epos Techs.*,
 19 766 F.3d at 1347 (reversing district court’s construction “because it reads out preferred
 20 embodiments”); *Vitronics*, 90 F.3d at 1583 (a claim construction so narrow as to exclude the
 21 principal preferred embodiments “is rarely, if ever, correct and would require highly persuasive
 22 evidentiary support”).

23 BN3TH’s construction is consistent with the examples in the Specification, and the full
 24 breadth of the plain meaning of “rectangular” to a POSA in the garment industry. It should be
 25 adopted over Rampion’s proposed construction, which would exclude the preferred embodiment
 26 contrary to the Specification.

J. “A Dart Seam Stitched Along a Bottom Portion of the Pouch” (JCC at 68-70)

BN3TH: A shaping seam where material has been folded or removed to provide three-dimensional shaping or space, where the seam is stitched along a bottom portion of the pouch.

Rampion: An additional seam present along the bottom portion of the front portion but not along the top portion of the front portion. (emphases added)

The phrase “a dart seam stitched along a bottom portion of the pouch” is found in dependent Claim 15 each Asserted Patent, which provides: “A garment according to claim 1 wherein the pouch comprises a dart seam stitched along a bottom portion of the pouch and substantially centrally to provide extra volume in front of and underneath the genitals of a wearer.” BN3TH’s proposed construction of the phrase “a dart seam stitched along a bottom portion of a pouch”⁸ is true to the plain and ordinary meaning of the language in the context of the surrounding claim language.

BN3TH’s construction is consistent with the plain meaning of the technical garment design term “dart seam” because it requires a *shaping* seam where material is removed or folded over. *See* JCC Exs. 48-49 (technical treatise discussion of dart seams and relevant treatise glossary entries). BN3TH’s construction is also consistent with the surrounding claim language and the discussion of dart seams in the Specification and prosecution history, in that it requires the dart seam to be present, at least, in the bottom portion of the pouch. *See* JCC at 68-69 (citing and summarizing discussion of dart seams in intrinsic record).

Dart seams are a well-understood method of adding shape to a garment to create a contoured three-dimensional shape, including to fit over a convex protrusion of the body (*e.g.*, the bust in a women’s top or a pouch in men’s underwear). *See* JCC Ex. 48 at 199 (glossary entries, including for “darts,” “dart equivalents,” and “dart manipulation”). This can be done by folding over or removing a wedge-shaped section of material at a seam, referred to as a dart seam, which provides three-dimensional shaping to an otherwise relatively flat fabric panel. *Id.* It is well understood in the garment design art that dart seams can be moved to different positions around the central point of the

⁸ “Pouch” is a claim term the parties separately identified for construction, and as to which the parties have reached an agreed upon construction. *See* ECF No. 47.

1 bodily protrusion being fitted, and can be made either as a single dart, a series of tucks, or a styleline
 2 seam, so long as the same amount of material in total is removed around the central point of the
 3 protrusion.⁹ JCC Ex. 49 (treatise *Patternmaking for Fashion Design*); *see also* JCC Ex. 48 at 199
 4 (“Dart intakes may be converted into stylelines . . . with the fit of the garment maintained.”)
 5 BN3TH’s proposed construction is consistent with this well-established meaning of “dart seam,” and
 6 also comports with the surrounding claim language requiring the dart seam to be stitched at least in
 7 the bottom portion of the pouch. *See* ’030 patent Claim 15; ’496 patent Claim 15.

8 In contrast, Rampion’s proposed construction is in part too broad, because it applies to *any*
 9 “additional seam,” without requiring that such a seam involve folding over or removing a wedge-
 10 shaped piece of fabric so as to change the three-dimensional fit of the garment. This is directly
 11 contrary to the plain and ordinary meaning of “dart seam,” which requires folding over or removal of
 12 such a wedge/dart-shaped piece of fabric to give the garment three-dimensional shape. JCC Exs. 48-
 13 49; *see also* JCC Ex. 49 at 168 (distinguishing between styleline seams that do and do not function as
 14 dart seams, depending on whether fabric is removed and whether the seam passes through a dart
 15 point).¹⁰ Rampion’s proposed construction is also incomplete and confusing, because it does not
 16 explain what the “additional seam” is in addition to. For these reasons alone, Rampion’s proposed
 17 construction is inadequate.

18 As underlined above, Rampion also inserts into its proposed construction the phrase “but not
 19 along the top portion of the front portion,” effectively rewriting the claim language to require that the
 20 dart seam be stitched *only* in the bottom portion of the pouch. This additional limitation has no basis
 21 in the plain meaning of the claim language or in the Specification. Claim 15 provides that the
 22 “pouch” of the garment “comprises” a dart seam stitched along the bottom portion of the pouch. As

23 ⁹ The figures of both Asserted Patents (*e.g.*, item 19 in ’030 patent Figs. 1-4) show dart seams from the inside and outside
 24 with the excess material removed, rather than folded over (no folding over is shown on either the front or back side of the
 25 seam). As such, both parties’ proposed constructions, consistent with this disclosed exemplary embodiment, are broad
 26 enough to include dart seams where the excess material is removed. *See* JCC Ex. 48 at 199 (seam with wedge-shaped
 piece of material removed functions as a dart); JCC Ex. 49 at 168 (similar); JCC at 68 (parties’ competing constructions).

¹⁰ Rampion’s proposed construction is also inconsistent with the dictionary definitions that Rampion cites. *See* JCC Exs.
 58-61 (requiring folding over or removal of wedge-shaped piece of fabric to make a seam a “dart seam”).

the Court is well aware, “comprises” is a patent claim legal term of art, which means “including or having, *but not exclusively*. . . . This term does not limit the claim to the specified elements, so a later patent applicant’s product or process cannot avoid infringement by merely adding another claim element. Hence a claim reciting ‘a widget comprising A and B,’ for example, is infringed by any widget that includes A and B, even if C, D, or E might be present.” *Comprising, Black’s Law Dictionary* (10th ed. 2014) (emphasis added) (citing *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1344–45 (Fed Cir. 2003) (“‘Comprising is a term of art used in claim language which means that the named elements are essential, but other elements may be added and still form a construct within the scope of the claim.’” (citation omitted))). Thus, a pouch with a dart seam stitched in both its top portion and its bottom portion is still a pouch that “comprises a dart seam stitched along a bottom portion of the pouch.” For this independent reason, Rampion’s proposed construction is legally improper and should be rejected.

IV. CONCLUSION

For the reasons discussed above, BN3TH’s proposed constructions of the disputed claim terms should be adopted, and Rampion’s proposed constructions rejected.

RESPECTFULLY SUBMITTED: May 24, 2019.

STOEL RIVES LLP

/s/ Brian C. Park

Brian C. Park, WSBA No. 25584

600 University Street, Suite 3600

Seattle, WA 98101-4109

Telephone: (206) 386-7542

Facsimile: (206) 386-7500

Email: brian.park@stoel.com

/s/ Steven T. Lovett

Steven T. Lovett (admitted *pro hac vice*)

steve.lovett@stoel.com

/s/ Nathan C. Brunette

Nathan C. Brunette (admitted *pro hac vice*)

nathan.brunette@stoel.com

760 S.W. Ninth Avenue, Suite 3000

Portland, OR 97205

Telephone: (503) 224-3380

Facsimile: (503) 220-2480

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PLAINTIFFS' OPENING CLAIM CONSTRUCTION BRIEF** on the following named person(s) on the date indicated below by

.. mailing with postage prepaid

.. hand delivery

.. facsimile transmission

.. overnight delivery

☒ CM/ECF notification

Paul Meiklejohn
meiklejohn.paul@dorsey.com
Erin Kolter
kolter.erin@dorsey.com
Dorsey & Whitney LLP
701 Fifth Avenue, Suite 6100
Seattle, WA 98104

Attorneys for Defendants

DATED: May 24, 2019.

/s/ Brian C. Park

Brian C. Park, WSBA No. 25584

Steven T. Lovett (admitted *pro hac vice*)

Nathan C. Brunette (admitted *pro hac vice*)

Attorneys for Plaintiffs